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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 377161 - II

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FUTUREWISE,

Appellant,

vs.

**CENTRAL PUGET SOUND GROWTH MANAGEMENT
HEARINGS BOARD, an agency of the State of Washington, and
CITY OF BOTHELL**

Respondents.

APPELLANT'S BRIEF

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I. INTRODUCTION

Appellant Futurewise challenges the ruling from the Superior Court of Thurston County which upheld the decision of the Central Puget Sound Growth Management Hearings Board (the Board) regarding the housing element of the City of Bothell's comprehensive plan under the Growth Management Act (GMA), Chapter 36.70A RCW.

According to Bothell's data, Bothell has a significant unmet need for additional affordable housing, yet Bothell's housing element utterly fails to provide adequate provisions for the development of housing for low and moderate income residents. Bothell's housing element is comprised mostly of vague goal statements that lack any specific plans or implementation language. Thus, Bothell's well-defined need for additional affordable housing will continue unabated.

Futurewise appealed the decision made by the Board because the Board was excessively deferential, it relied on an erroneous interpretation of the GMA to approve Bothell's housing element, and because there is no substantial evidence that Bothell's housing element makes "adequate provisions for the preservation, improvement, and development of housing for all economic segments of the community" as required by the GMA.

II. ASSIGNMENTS OF ERROR

1. The Board erred in granting excessive deference to Bothell's housing element.
2. The Board erred in its legal conclusion that the "adequate provision" requirements of RCW 36.70A.070(2)(d) were purely optional.
3. The Board erred in its legal conclusion that RCW 36.70A.540 was the exclusive authority related to any and all incentive programs for affordable housing.
4. The Board erred in approving Bothell's housing element without substantial evidence that the housing element included adequate provisions for the preservation, improvement, and development of housing for all economic segments of the community as required by the GMA.

II. ISSUES RELATED TO ASSIGNMENT OF ERROR

- A. Is deference required when a municipality's proposed housing element conflicts with the goals and requirements of the GMA?
- B. Does RCW 36.70A.070(2)(d) require the adoption of implementation provisions to address the need for affordable housing, or are vague goal statements sufficient to satisfy the "adequate provisions" required by the GMA?
- C. Does RCW 36.70A.540 make any and all municipal efforts to address affordable housing purely optional, or is RCW 36.70A.540 limited by its terms to apply only to development regulations?
- D. In approving a proposed housing element, does the Board need to find substantial evidence to suggest that the proposed housing element includes adequate provisions to address the need for affordable housing?

III. STATEMENT OF THE CASE

A. The History of Bothell's Housing Element.

On December 12, 2006, Bothell adopted Ordinance 1973, Bothell's updated Housing Element portion of the Imagine Bothell Comprehensive Plan ("the Plan").¹ See Administrative Record (AR), p. 47-77.

In constructing its housing element, Bothell considered the housing elements from the cities of Bellevue, Kirkland, Redmond, and Newcastle which contain mandatory provisions and development regulations that encourage affordable housing.² (AR p. 150-198).

Additionally, Futurewise submitted comment letters to the Bothell Planning Commission and City Council during the comment period recommending adoption of a workable incentive policy to include density bonuses, height bonuses, parking reduction bonuses, or other effective incentives.³ (AR p. 219-221, 223-234). These comments were considered and in large part recommended by Bothell's Planning Manager.⁴ (AR 352-355).

¹ This Ordinance is Tab 4 to the Administrative Record in this matter.

² Tab 49, City of Bellevue Housing Element; Tab 50, City of Kirkland Housing Element; Tab 51, City of Redmond Housing Element; Tab 52, City of Newcastle Housing Element.

³ Comment letters from Tim Trohimovich dated July 3, 2006 (Tab 57) and October 17, 2006 (Tab 61).

⁴ Tab 56, City of Bothell Interoffice Memorandum dated June 9, 2006.

B. The Housing Element Shows an Uncontested Need for a Dramatic Increase In Affordable Housing.

The City of Bothell is located in north central King County and south central Snohomish County.⁵ (AR 14-15). The city's 2005 population was estimated at 31,000.⁶ (AR 15). This represents a three percent increase from its 2000 population of 30,150.⁷ (AR 15). Between 1990 and 2005 the city's population grew by 151 percent.⁸ (AR 15). The majority of the homes, 56.4 percent, are single-family residences and the city expects single-family homes will remain a majority in the future.⁹ (AR 15).

As the Plan notes, "over the past 10 years, job growth has significantly outpaced housing growth in Bothell, even more so than countywide figures for King County and Snohomish County.... Continued job growth will increase demand for housing in the future."¹⁰ (AR 27).

⁵ *Imagine Bothell...* Comprehensive Plan 2006 Comp Plan Update Housing Element Council Adopted Version 121206 pp. HO-6-HO-7. In Futurewise's Petition for Review in Tab 1.

⁶ *Id.* at p. HO-7.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at p. HO-7.

¹⁰ *Id.* at p. HO-19.

As would be expected, this strong job growth has contributed to increases in housing costs. “Between 2000 and 2005, increases in Bothell housing sales prices (24.6%) have outpaced increases in area median incomes (18.4%) potentially decreasing ownership housing affordable to median income households.”¹¹ (AR 18).

Strong employment growth and increased housing prices have led to significant housing needs. The King County and Snohomish County countywide planning policies establish affordable housing targets.¹² (AR 26-27). Those targets for the City of Bothell were summarized in Bothell’s Housing Element Table HO 16, showing that the existing need for affordable housing in Bothell called for 1,220 dwelling units, and that the projected need would more than double by 2025, to require 2,794 units of affordable housing. (AR 26).

Also in 2000, only about 6.6 percent of Bothell’s rental housing was priced below \$500 a month and “may be affordable to some low-income families.”¹³ (AR 19). However, the 17 percent of the Bothell households classified as low-income are competing for the 6.6 percent of rental units that those households can afford. (AR 18). Of the low-

¹¹ *Id.* at p. HO-10.

¹² *Id.* at p. HO-18-HO-19.

¹³ *Id.* at p. HO-11.

income households in 2000, 72 percent paid more than 35 percent of their incomes for housing and 48 percent paid more than 50 percent of their incomes for housing.¹⁴ (AR 19).

One way to address the problem of paying a high percentage of household incomes for housing is assisted housing. However, Bothell only has 231 units of assisted housing in the entire city, a number that has apparently not changed since 2000.¹⁵ (AR 21).

At the hearing before the Board, the need for affordable housing in Bothell, both now and in the future, was uncontested. The numbers discussed above for existing needs and projected needs were apparently accepted by both sides and the Board.

C. The Housing Element Includes Numerous Goal Statements, But Lacks Meaningful Implementation Language.

Unfortunately, Bothell's Housing Affordability section of the Goals, Policies and Actions segment in the Housing Element is lacking in any concrete implementation language:

- HO-G5 Encourage the availability of affordable housing to all economic segments of the population of the City.
- HO-P17 Support the development of affordable housing in accordance with the strategies set forth in these Housing policies.

¹⁴ *Id.* at HO-11.

¹⁵ *Id.* at p. HO-13. There were 231 households in Bothell receiving housing assistance in both 2000 and 2005. *Id.*

- HO-P18 Support development of government-assisted housing and disperse such housing throughout the community.
- HO-P19 Require that property owners or developers who displace low-income tenants due to demolition, substantial rehabilitation, change of use, or other reasons provide relocation assistance to such tenants. Low-income tenants include tenants whose combined total income per dwelling unit is at or below 50 percent of the median income, adjusted for family size, in accordance with the Growth Management Act.
- HO-P20 Consider market incentives to encourage affordable housing to meet the needs of people who work and desire to live in Bothell.
- HO-A8 Coordinate with the King and Snohomish County Housing Authorities, King and Snohomish County planning departments, human service agencies and other appropriate agencies regarding affordable housing and housing for special populations.
- HO-A9 Pursue adoption of regulations requiring property owners to provide relocation assistance to displaced low-income tenants.

(AR 31-32).

Words like “consider,” “encourage” and “support” are included without timeframes, specific requirements, or other basic implementation language. Id.

D. The Administrative Hearing.

Futurewise was concerned that the vagueness of the Housing Affordability section would almost certainly lead to a “business as usual”

approach in Bothell without any significant progress toward compliance with the GMA's requirement of "adequate provisions for the preservation, improvement, and development of housing for all economic segments of the community." Given the uncontested need for additional affordable housing in Bothell, Futurewise challenged Bothell's Housing Element before the Board.

In its Final Order (AR 430-444), the Board granted broad deference to Bothell's Housing Element and approved the Housing Element based on the Board's erroneous legal conclusion that the requirements of RCW 36.70A.070(2)(d) were not mandatory. (AR 439, line 38). The Board seemed to rely on its erroneous legal conclusion that housing incentives in general were all made purely optional by RCW RCW 36.70A.540. (AR 438, line 26). The Board did not make evidentiary findings sufficient to show that Bothell's Housing Element was capable of addressing its uncontested need for affordable housing. Instead, the Board stated that is "assumes that Bothell will give careful consideration to [affordable housing incentive] programs" without any timeframe or requirement for action. (AR 438, line 35).

E. The Superior Court Review.

At oral argument on appeal before the Superior Court of Thurston County, the court deferred to the Board's interpretation of the GMA on the

issue of whether the requirements of RCW 36.70A.070(2)(d) were mandatory or optional. (RP 37-38). The court also seemed to adopt the idea that incentives for affordable housing would necessarily cost money, and found that troubling. (RP 38, line 8-15, referencing “unfunded mandates” and “translation into dollars”). However, Futurewise had argued that the options to promote affordable housing were myriad, and could simply involve policy changes, relaxation of building or zoning restrictions or other actions that would promote affordable housing without necessarily requiring any municipal funding.

Also, Bothell argued against the assertion that there was a gap between supply and demand for affordable housing. The court pointed out that units of assisted housing were not the only measure of available affordable housing. However, having made this observation, the court then appeared to ignore the rest of Bothell’s statistics showing that by any measure, there was still a large gap between supply and demand for affordable housing in Bothell, and that Bothell’s numbers showing need were uncontested at the administrative hearing below. (RP 15-17).

IV. ARGUMENT

A. Standard of Review.

An appeal of a Growth Board decision is generally reviewed for abuse of discretion. *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 7-8, 57 P.3d 1156, 1159-60 (2002). The Supreme Court explained how the Administrative Procedure Act applies:

“When reviewing a decision of the Board, we apply the standards of chapter 34.05 RCW, the Administrative Procedure Act (APA), and base our review upon the record made before the Board. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 45, 959 P.2d 1091, 1093-94 (1998). Under the judicial review provision of the APA, the “burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity.” RCW 34.05.570(1)(a).

Thurston County v. Cooper Point Ass'n, 148 Wash.2d 1, 7-8, 7 P.3d 1156, 1159-60 (2002).

Because Futurewise asserts the invalidity of a Growth Board order resulting from an adjudication, RCW 34.05.570(3) applies to this appeal. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 45, 959 P.2d 1091, 1093 (1998).

The decision here violated two provisions of RCW 34.05.570(3), which provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative

proceeding only if it determines that: ...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

The courts have addressed each of these provisions in regard to appeals of Growth Board decisions. The Supreme Court wrote as to RCW 34.05.570(3)(d):

[W]e essentially review such questions de novo. We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute. As we stated in *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wash.2d 552, 555, 637 P.2d 652 (1981):

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review....

We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law. "Concerning conclusions of state law this court is the final arbiter, and conclusions of state law entered by an administrative agency or court below are not binding on this court." *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wash.2d 271, 286, 525 P.2d 774, 804 P.2d 1 (1974).¹⁶

Id., 136 Wash.2d 38 at 46, 959 P.2d at 1094.

The Supreme Court also interpreted RCW 34.05.570(3)(e):

“In reviewing the agency’s findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’”

King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wash.2d 543, 553, 14 P.3d 133, 138 (2000), quoting *Callecod v. Wash. State Patrol*, 84 Wash.App. 663, 673, 929 P.2d 510 (1997).

B. The Board Erred In Granting Deference to Bothell’s Housing Element When It Was Clearly Erroneous In Light of the Goals and Requirements of the GMA.

The Washington Supreme Court and Court of Appeals have set out the standards the Growth Board is to apply to the City of Bothell’s enactment:

The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. The Board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]. To find an action “clearly erroneous,” the Board must be left with the firm and definite conviction that a mistake has been committed.

King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000). (Internal citations and quotation marks omitted.)

The deference to be granted to a city's housing element is still bounded by the goals and requirements of the GMA:

While the County is correct that RCW 36.70A.3201 requires "boards to grant deference to counties" in their development plans, such deference is not unbounded. The GMA itself limits a county's discretion. As our State Supreme Court recently stated,

Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." *Diehl*, 94 Wn. App. at 651. Local discretion is bounded, however, by the goals and requirements of the GMA. In reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities *consistent with the requirements of this chapter*" and to "grant deference to counties and cities in how they plan for growth, *consistent with the requirements and goals of this chapter*." RCW 36.70A.3201 (emphasis in original).

King County v. Cent. Puget Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 561, 14 P.3d 133 (2000). Thus:

Consistent with *King County*, [142 Wn.2d at 461] and notwithstanding the "deference" language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not "consistent with the requirements and goals" of the GMA.

Thurston County v. Cooper Point Association, 108 Wn. App. 429, 444, 31 P.3d 28 (2001), *affirmed Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002).

The record shows that Futurewise has met its burden because the housing element of the City's Comprehensive Plan fails to meet the goals and requirements of the GMA. Because the Housing Element clearly falls short of the requirements set out in RCW 36.70A.070(2), it is no longer entitled to deference.

This case is not a disagreement over discretionary choices made by the City in addressing the issue of affordable housing. This case is about the absence of required policies and steps in Bothell's Housing Element to make adequate provisions for existing and projected needs of all economic segments of the community.

C. The Board Erred in Reaching the Legal Conclusion That the Requirements of RCW 36.70A.070(2) Are Purely Optional.

The Growth Management Act requires cities and counties to make adequate provisions for affordable housing. In determining whether a city's or county's Housing Element complies with the GMA, the Board must consider both the goals and the specific requirements of the GMA. *LIHI v. City of Lakewood*, 119 Wn. App. 110, 116, 77 P.3rd 653, 655 (2003). According to RCW 36.70A.020(4), housing is one of the 13 planning goals of the GMA:

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing

types, and encourage preservation of existing housing stock.

The housing sections of the Growth Management Act were addressed by the Court of Appeals in the *LIHI v. City of Lakewood* case. In *LIHI*, the City of Lakewood enacted a comprehensive plan where the Plan failed to contain “a housing element ensuring the vitality and character of established residential neighborhoods as required by RCW 36.70A.070(2).” *Id.* at 114. The Court of Appeals held that comprehensive plans must comply with both the goals and specific requirements of the GMA. *Id.* The court also held that the plan must make adequate provisions for existing and projected needs of all economic segments of the community, as required by RCW 36.70A.020(4):

Although here, the Board may have correctly ruled that LIHI did not prove that Lakewood failed to comply with a specific GMA requirement, it should also have addressed whether and how the Lakewood Plan “[e]ncourage[d] the availability of affordable housing to all economic segments of the population... promote[d] a variety of residential densities and housing types, and encourage[d] preservation of existing housing stock” as required by the affordable housing goal set forth in RCW 36.70A.020(4).

Id. at 116.

Thus, the housing goal of the GMA has been held to contain three distinct requirements:

- 1) Encourage the availability of affordable housing to all segments of the population of this state,

- 2) promote a variety of residential densities and housing types, and
- 3) encourage the preservation of existing neighborhoods.

Bothell's Housing Element fails these GMA goals through a lack of significant funding, controls, and/or incentives within the city limits. This can be seen in the gap between the city's housing needs and its supply of affordable housing and the Housing Element's failure to address this serious problem.

According to Table H0-16 of the Housing Element, Bothell had existing need for 1,220 units of affordable housing, and its projected need was for 2,794 units of affordable housing.¹⁷ (AR 67). This is 12 times the current supply of 231 assisted housing units in all of Bothell. (AR 62).

Futurewise does not argue that Bothell must supply assisted housing for its entire need for affordable housing. A wide range of options could be implemented. But the bottom line is that current market forces have left 17% of Bothell's families (the amount of low income households in Bothell) fighting for only 6.6% of rental housing that "may be considered affordable to some low income families." (AR 60).

¹⁷ *Imagine Bothell...* Comprehensive Plan 2006 Comp Plan Update Housing Element Council Adopted Version 121206 p. HO-18.

Given this tremendous need, Bothell is required to incorporate planning that would make adequate provisions to address the actual need. Instead, the Housing Element is composed largely of goals without specific implementation language.

The GMA implements its housing goals through the mandatory provisions of the Housing Element laid out in RCW 36.70A.070(2)[emphasis added]:

Each comprehensive plan **shall** include a plan, scheme, or design for **each** of the following ...

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) **makes adequate provisions for existing and projected needs of all economic segments of the community.**

The word “shall” is normally interpreted as a mandatory requirement rather than an optional or discretionary term.

The Board previously addressed the type of policies that do encourage the availability of affordable housing when it reviewed the City of Newcastle's Housing Element:

The Plan's housing policies show that Newcastle is encouraging the development of affordable housing. The Plan's housing policies make block grant funds available for affordable housing (HO-10); encourage coordination of affordable housing incentive programs with other cities and the County (HO-P11); allow density bonuses to single-family and multi-family developments that provide affordable units (HO-P12); require the City to review the permit process to reduce negative impacts on housing costs (HO-P13, HO-P17); and encourage the City to work with lending institutions to find solutions that reduce housing financing costs for builders and consumers (HO-P16). These are the types of policies and commitments necessary to meet the GMA's direction to attack the affordable housing issue; these are the types of policies and commitments that encourage availability of and make adequate provisions for affordable housing.

City of Renton v. City of Newcastle, CPSGMHB Case No. 97-3-0026 Final Decision and Order p. 6 of 7 (February 12, 1998).

The Board offered clarification on mandatory provisions under RCW 36.70A.070(2)(b) in *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072 Final Decision and Order p. 18-19 of 33 (March 25, 1996). There the Board required the City of Redmond's comprehensive plan to satisfy the GMA requirements that ensure affordable housing and described the GMA requirements as follows:

The verbs used in the housing sections are: "encourage," "ensuring," and "consider." Subsection 2 of RCW 36.70A.070 has the most substantive mandate. This subsection requires comprehensive plans to include a plan, scheme or design for housing. Among its other provisions (a)--(c) as quoted above, the housing element must make "adequate provisions for existing and projected needs of all economic segments of the community."

The Board found Redmond's policies compliant with the GMA, noting that they were "designed to carry out the affordability goals discussed in the 'Housing Needs' section as well as fulfill the GMA planning goals."²⁰ The Board specifically noted:

For example, Policy HO-16 provides that, in order to encourage the development of **affordable** housing, **incentives** and **bonuses** that are intended to minimize costs to the developer or builder **shall** be provided by the City.²¹

The key difference between the policy approved by the Board in *Benaroya* and Bothell's ordinance is that Redmond's policies were mandatory, whereas Bothell's are suggestive. The goals, policies, and actions referenced in the Bothell Housing Element fail to include any provisions comparable to Redmond's Policy HO-16 above.²² No policy

²⁰ *Id.* at 20.

²¹ *Id.* (Emphasis added).

²² *Imagine Bothell... Comprehensive Plan 2006 Comp Plan Update Housing Element Council Adopted Version 121206 p. HO-22-HO-27. See also Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB Case No. 96-1-0009 Order on Petition for Reconsideration and Invalidity p. 8 of 13 (March 20, 1997)(Mandatory provisions sufficient); *but see Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c Final Decision and Order p. 25 of 63 (March 12, 2007)(Subject to motion for reconsideration) (Holding that suggestive provisions are sufficient).

requires Bothell to give incentives and bonuses, and no policy will adequately address the clear need in Bothell for affordable housing.²³

Bothell's plan fails not in its goals, but in its utter lack of implementation. There are no deadlines for action. Indeed, Bothell is now over two years beyond its deadline to review and revise the comprehensive plan and development regulations per RCW 36.70A.130(4)(a). The time for considering and adopting has passed. It is now time for Bothell to implement. The Housing Element clearly does not contain adequate provisions for implementation of goals. Policy HO-P34 on page HO-27 (AR 76) calls on the city to "strive to meet" ... "affordable housing targets through a combination of policies, incentives, regulations, and programs." But nothing here indicates that any decision and action called for in Policy HO-P34 has been made.

No policy requires the city to review the permitting process to reduce negative impacts on housing costs.²⁴ Policy HO-P14 does call for streamlined permitting, but only for accessory dwelling units and there is no mention of affordability or housing costs in the policy.²⁵ No policy encourages the city to work with lending institutions to reduce housing

²³ *Imagine Bothell...* Comprehensive Plan 2006 Comp Plan Update Housing Element Council Adopted Version 121206 p. HO-22-HO-27.

²⁴ *Imagine Bothell...* Comprehensive Plan 2006 Comp Plan Update Housing Element Council Adopted Version 121206 pp. HO-22-HO-27.

²⁵ *Id.* at p. HO-P14.

financing costs for builders and consumers.²⁶ In short, the Bothell Housing element does not contain any of the provisions that brought the Newcastle Housing Element into compliance with the GMA housing goal.

The policies that brought Newcastle into compliance with the GMA are by no means an exclusive list. There is no limit to the creative and collaborative actions that can be taken to address Bothell's need. Bothell has a range of options available to it to encourage affordable housing. Foremost, a system of density bonuses, height bonuses, and parking reduction bonuses tied to the creation of affordable housing would provide concrete financial motivation to real estate developers wanting to build housing in Bothell to include affordable housing in their plans. Bothell can also increase density overall by increasing the amount of land zoned 15 du/acre to a total of 66 acres. This change would encourage the construction of generally lower-priced multiple family dwellings. Bothell can further provide funding for assisted housing within its borders.

Nearby cities have demonstrated the ease with which the goals and requirements of the GMA's housing element can be satisfied. Housing Elements from Bellevue, Kirkland, Redmond and Newcastle exhibit the kind of mandatory provisions for "existing and projected needs of all economic segments of the community" missing from Bothell's plan. For

²⁶ *Id.* at pp. HO-22-HO-27.

example, the City of Redmond Housing Element contains the following mandatory provisions.

HO-35 Require a portion of units as part of any rezone that increases residential capacity to be affordable to low- and moderate-income households.

HO-41 Grant priority in the development review process for projects that offer 15 percent or more of the proposed residential units at affordable rates.²⁷

Thus, the inclusion of mandatory policies is not an impossible task. However, relying solely on preservation of mobile homes and hoping other government agencies will construct affordable housing is simply not enough. Bothell's Housing Element is not the "attack" on the affordable housing issue required by the Growth Management Act. Rather, it is a retreat. And if this retreat is accepted by the court, then it sends a signal to other municipalities that the GMA may be fully satisfied by little more than abstract goal statements. Thus, the GMA is effectively nullified on this issue and will become nothing more than a bureaucratic hoop through which to jump.

The Board's Final Decision and Order simply wrote the requirements of RCW 36.70A.070(2)(d) out of the GMA. Writing these requirements out of the GMA is clearly an erroneous interpretation of the

²⁷ Tab 51, City of Redmond Housing Element, page 77-78.

law. The Board violated RCW 34.05.570(3)(d) and the decision must be remanded back to the Board for action consistent with the GMA.

D. RCW 36.70A.540 Refers Only to Development Regulations - It Does Not Make the Broader Requirements of RCW 36.70A.070(2)(d) Purely Optional.

Legislative findings predict that “absent any incentives to provide low-income housing, market conditions will result in housing developments in many areas that lack units affordable to low-income households, circumstances that can cause adverse socioeconomic effects.”²⁸ RCW 36.70A.540(1)(a) outlines requirements for development regulation incentive programs. Such development regulation incentive programs are highly favored but optional. By instituting a housing incentives program like those discussed in RCW 36.70A.540(1)(a), Bothell can avert negative adverse socioeconomic effects.

In this case the Board appeared to presume that RCW 36.70A.540(1)(a) was the sole authority regarding incentives to promote affordable housing, whether contained in development regulations or comprehensive plans in general. This was an erroneous interpretation of the law: RCW 36.70A.540(1)(a) applies only to optional development regulation incentive programs. The Board appears to have missed the distinction between development regulations and other types of mandatory

²⁸ RCW 36.70A.540 (Notes: Findings – 2006 c 149 §1)

support for affordable housing that may be included in a comprehensive plan. RCW 36.70A.540(1)(a) does not convert the mandatory elements of RCW 36.70A.070(2) into optional elements. The Board's reasoning on this issue was a pure error of law.

E. The Board's Decision Was Not Based On Substantial Evidence.

RCW 34.05.570(3) provides in part:

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

Here the Board's Final Order is not supported by substantial evidence. Rather than look for evidence that Bothell's plan would actually meet Bothell's well-defined need for additional affordable housing, the Board here decided that adequate provisions for affordable housing were an optional component of a housing plan under the GMA, so there was no need to look into the evidence. The Board did not believe that it was required to look past the window dressing provided by the abstract but toothless goals articulated by Bothell. Because of the Board's approach to this case, Bothell has effectively side-stepped the requirements of the GMA regarding affordable housing, and thus displaced the issue onto its surrounding municipalities. If this plan stands, it will send a signal to

other municipalities that there is no longer a statutory obligation to provide adequate provisions for affordable housing.

V. CONCLUSION

The City of Bothell's Housing Element falls short of the GMA's requirements because it fails to meet the GMA's housing goals or to provide adequate provisions for the preservation, improvement, and development of housing for all economic segments of the community. For these reasons, Futurewise respectfully asks the Court of Appeals to reverse the dismissal of appellant's Petition for Relief and remand this case to the Board with instructions to review Bothell's proposed housing element in light of RCW 36.70A.070(2)'s mandatory requirements.

RESPECTFULLY SUBMITTED this 24 day of July, 2008.

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STATE OF WASHINGTON
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NO. 377161 - II

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FUTUREWISE,

Appellant,

vs.

**CENTRAL PUGET SOUND GROWTH MANAGEMENT
HEARINGS BOARD, an agency of the State of Washington, and
CITY OF BOTHELL**

Respondents.

DECLARATION OF SERVICE

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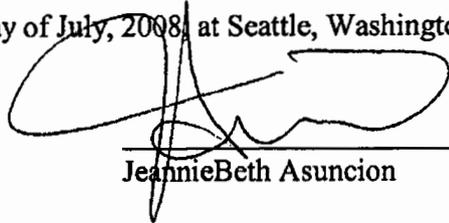
The undersigned, declares as follows:

On July 24, 2008, I had a copy of Appellant's Brief to be served by legal messenger to the following:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of July, 2008, at Seattle, Washington.



JeannieBeth Asuncion